UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

KELLIE O'KEEFE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 4:01 CV 816 RWS
	)	DDN
JO ANNE B. BARNHART,[1]	)	
Commissioner of	)	
Social Security,	)	
	)	
Defendant.	)	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

This action is before the court for judicial review of the final decision of the defendant Commissioner of Social Security denying plaintiff's application for supplemental security income benefits based on disability under Title XVI of the Social Security Act, 42 U.S.C. §§ 1381, et seq. The court has subject matter jurisdiction over the action under 42 U.S.C. §§ 405(g) and 1383(c)(3). The action was referred to the undersigned United States Magistrate Judge for a recommended disposition under 28 U.S.C. § 636(b).

Plaintiff Kellie O'Keefe applied for benefits on January 10, 2000, at age 37. She alleged she became disabled on May 11, 1999, on account of pain in her back and left wrist. She alleged she became unable to perform her duties, firing a gun and lifting items, as a prison corrections officer. (Tr. 183). Her other past employment was as a police officer and a deputy sheriff. (Tr. 184).

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[1]Jo Anne B. Barnhart became the Commissioner of Social Security on November 9, 2001, and is substituted for Larry G. Massanari as the defendant in this suit. Fed. R. Civ. P. 20(d)(1).

The administrative record

On March 4, 1992, plaintiff was seen by her treating physician, P. Bramhall, D.O. In that visit she complained of being tired all the time and having back pain from a bulging disc and a slipped disc. He prescribed physical therapy and Voltaren. On March 30, 1992, plaintiff seemed to be doing better. He continued her on medications. Thereafter, into 1994, her pain continued and she received refills of her medications. (Tr. 240-46). On June 22, 1994, she complained of depression. Her prescription for Prozac was refilled. (Tr. 247-48). She complained of depression in August 1994 and in August 1995 she indicated she was getting some relief from her depression from the Prozac. (Tr. 303-05).

On February 9, 1995, Frank R. Luschtefeld, M.D., examined plaintiff on referral by the state agency. Plaintiff complained of problems with her back and right leg since July 28, 1989, when she fell down stairs. From her history, Dr. Luschtefeld suspected a problem with her lumbar disc and a tear of the right medial meniscus.[2] He recommended surgery, which plaintiff refused, as she had in the past. He felt that nothing will help her unless she considers surgery. He stated,

> I do not think she is a candidate for retraining at a job, since she notes that if she sits for more than ten or fifteen minutes, then she gets burning pain in her back. With activities, she cannot do her ordinary housework because she has problems with her back. So, just exactly what she would be able to do in the job market, I am not sure. This is your decision to make. I think she is going to have pain in any situation without surgery on her back.
>
> . . . [S]he needs a knee arthrogram to see if there is a tear of the medial miniscus. If there is, then she would need surgery on that to either repair or resect it . . . .

[2]The meniscus is a structural component of the knee. Stedman's Medical Dictionary, at 944 (25th ed.).

> . . . I think that she is really not an employable person at this time.

(Tr. 250).

Dr. Bramhall's office notes of December 13, 1995, indicated significant degenerative arthritis with some probably bulging discs rather than a herniated disc and myositis,[3] and inflammation of the muscles. He also noted mild obesity, an history of hysterectomy, degenerative arthritis of the lumbosacral area and upper thoracic spine, a bulging disc, and myositis. (Tr. 308).

During several visits in 1996 and 1997, Dr. Bramhall continued to prescribe Prozac for depression and stress. (Tr. 308-15).

On September 19, 1997, Dr. Bramhall diagnosed degenerative arthritis, ASHD, and depression. His planned therapy included the prescription of Kelflex, Entex, and Prozac for depression. (Tr. 315).

On October 17, 1997, plaintiff saw Dr. Bramhall and complained of chest pains, back pain, dizziness, lightheadedness, and itching ears. (Tr. 317).

In April and May 1998, Dr. Bramhall examined plaintiff for follow up on depression. He diagnosed depression and obesity, but he ruled out hyperthyroidism. He determined to order a thyroid profile. (Tr. 318-19).

A psychological evaluation of plaintiff was performed by psychologist Kenneth G. Mayfield on February 25, 1999. In his report, Mr. Mayfield stated:

> The client appears to be experiencing considerable stress due to health and financial problems . . . physical limitations prohibit further employment in the Law Enforcement field and she appears to have no sense of direction at the present time. Insight somewhat limited, but judgement and reasoning appear intact.

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[3]Myositis is inflammation of a muscle. Stedman's Medical Dictionary, at 1018 (Williams & Wilkins, 1990).

He diagnosed adjustment disorder and anxiety and a GAF of between 65 and 70.[4] (Tr. 253). In assessing her functional abilities, he determined that plaintiff had the ability to relate to others. She had no marked evidence of social isolation. She is able to care for herself. She can understand and follow directions and perform simple, repetitive tasks. Her ability to cope with stress and pressures of routine work activities appeared somewhat questionable at that time. (Tr. 257-60).

Yusuf M. Chaudhry, M.D., performed a consultative internal medicine examination of plaintiff for the state agency. His report dated March 1, 1999, recounted her history and complaints of back pain, headaches, and muscle spasms from falling down stairs in 1989, and her hurting her left wrist when working in a prison in 1997. He diagnosed chronic low back pain syndrome, status post left wrist surgery, and obesity. (Tr. 251-52).

A September 9, 1999, office note indicated that Dr. Bramhall examined plaintiff and found tightness in her neck and upper back region, and poor range of motion. (Tr. 320).

A lumbar spine x-ray taken on September 14, 1999, was negative, and an x-ray of plaintiff's right foot showed a small spur, but was otherwise unremarkable. (Tr. 281).

On September 21, 1999, plaintiff saw Carmina Quiroga, M.D., another treating doctor, for pain in her right heel. Trigger point injections were given. (Tr. 340).

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[4]The Global Assessment of Functioning scale is used to describe a subject's overall level of functioning. Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV) (2000) at 32. A GAF of between 61 and 70 indicates

> Some mild symptoms (e.g., depressed mood and mild insomnia) OR some difficulty in social, occupational, or school functioning (e.g., occasional truancy, or theft within the household), but generally functioning pretty well, has some meaningful interpersonal relationships.

Id. at 34.

On September 23, 1999, plaintiff was seen in the hospital emergency room for back pain and left flank pain. On September 29, 1999, plaintiff came into Dr. Bramhall's office for a hospital follow up. He noted plaintiff's history of a herniated disc and chronic back pain, left leg numbness, her right leg symptoms, and the fact that she was thinking about surgery. On physical examination he saw that her back had poor range of motion and tenderness in left flank. He observed radicular symptoms of numbness, poor range of motion and spasms. He planned further testing for a herniated disc. (Tr. 322).

A CT lumbar spine x-ray taken on October 4, 1999, was normal. (Tr. 283).

On November 29, 1999, plaintiff underwent a Magnetic Resonance Imaging of her lumbar spine. The procedures resulted in findings of degenerative changes of the lumbar spine, most pronounced at the level of L3-L4 with left lateral disk bulging at the level of L3-L4 and at the level of L5-S1. (Tr. 284-85).

On December 7, 1999, Dr. Quiroga conducted a follow-up examination of her heel. Trigger point injections again were administered. (Tr. 341). Plaintiff was seen by Dr. Quiroga for her heel pain on December 28, 1999, January 18, 2000, and March 28, 2000. Her heel pain increased during this course of treatment. (Tr. 342).

Plaintiff saw Dr. Bramhall again on January 3, 2000, for lumbar pain. He diagnosed obesity, but no neuropathy. (Tr. 325).

On January 6, 2000, Dr. Bramhall wrote the state agency that he has been treating Ms. O'Keefe for lumbar pain, degenerative arthritis and herniated discs. She has continued to have low back pain with radiculopathy to the legs. The letter goes on to state that plaintiff is unable to work at this time due to back and leg pain. She will be unable to work for an undetermined amount of time. (Tr. 294).

On January 24, 2000, plaintiff visited Dr. Bramhall and he noted his monitoring of her back pain and obesity. (Tr. 326).

On February 1, 2000, plaintiff visited Dr. Bramhall for monitoring blood pressure and arthritis. Her extremities showed arthritic changes. Her lumbar spine was tender. (Tr. 326-27).

On April 18, 2000, Dr. Quiroga performed right foot surgery for chronic inflammation of the plantar fascia. (Tr. 355).

Plaintiff's subjective complaints

Plaintiff completed a Claimant Questionnaire on February 8, 1999. Plaintiff reported that she was able to prepare meals, clean, do laundry, and drive. She stated that she left her house two to three times a week to look for jobs or visit family. (Tr. 204-07).

At the evidentiary hearing before the ALJ, plaintiff testified about her biographical background. (Tr. 32-34). She has a ninth grade education and later received her GED in 1986 or 1987. She had vocational training for secretarial work and later went through the Police Academy at Mineral Area College in 1996. (Tr. 34-35).

Plaintiff testified she planned to join the St. Louis Police Department, but when she hurt her back she couldn't pass the physical. She did not work until she went to vocational rehabilitation and was advised by her counselor that she could go through the academy without doing the physical requirements. Ultimately she got a job as a Deputy Sheriff. (Tr. 35-36).

Plaintiff later became a correctional officer at Potosi Correctional Center and worked there about 1-1/2 years. She also worked part-time for a police department while a correctional officer. After that, she worked about two months for Guardsmark. (Tr. 36).

Plaintiff testified that her job as a security guard required a lot of walking and standing. (Tr. 37).

She testified that she had received SSI from approximately 1989 through 1996, after she injured her back.

She testified she has not worked in the law enforcement field because she cannot perform the required duties. She has back

problems and a lot of pain. Now, most law enforcement positions require a physical examination, which she cannot pass, and more education than she has. (Tr. 37-38).

Plaintiff testified that, when she worked for Guardsmark, they knew she had back problems and they told her that they could give her a position she could perform. However, her first post, which required no sitting, became too strenuous. Her employer then changed her post and cut her hours and stationed her where she could not perform. She received reprimands because she sat down. She finally quit. (Tr. 39).

Plaintiff testified about her medical treatment and condition, which included a ruptured disc that is pinching nerves, several bulging discs, arthritis, and a sprained spine. (Tr. 39-40). She has back pain and has a hard time lifting and walking. She cannot sweep or mop floors without being bedridden the next day. Walking is painful. (Tr. 40). She said she has had worsening right leg numbness and pain for the past 10 years. (Tr. 40-41).

She testified that her medication makes her delirious and gives her an upset stomach. (Tr. 41-42).

Plaintiff described her neck problem as causing burning and headaches. She has constant headaches unless she is inactive. She takes Celebrex. (Tr. 42).

She testified her wrists and fingers have been painful for the past two years. She takes Celebrex and wears a brace on her left wrist a couple of times a month for the pain. (Tr. 43).

Plaintiff testified that she appeared at the hearing before the ALJ in a wheel chair, because she had right foot surgery and she lacked the upper body strength to use crutches. (Tr. 44-45).

Plaintiff testified she has had depression for the past 10 years which is treated with Prozac. She takes 40 mg per day, an increase from two years ago. (Tr. 46). She has had crying spells every week for the past 10 years. (Tr. 46-47).

Plaintiff said her weight gain came from inactivity and poor diet. (Tr. 47). She has been prescribed exercises for her back,

which she does on occasion. She has been unable to keep up with all her therapy appointments because of a lack of finances and transportation problems. (Tr. 47-48).

Plaintiff drives usually only to the doctor and grocery store. Her son helps her shop, carries the grocery bags, and does the yard work. (Tr. 48). She tries to clean her trailer. (Tr. 49). She is no longer a member of any church or social organization and rarely goes out socially. She talks on the telephone and her family visits at her home on occasion. (Tr. 50).

Plaintiff testified that she has difficulties walking and that she can lift only 10 lbs. Her doctor has limited her to 8 lbs. At times she has trouble lifting a gallon of milk. (Tr. 51). She does laundry most of the time. She can squat but with difficulty. When she sits she has to change her position every 20 to 30 minutes. (Tr. 52).

Plaintiff testified she could not return to her prior work repairing eye glasses, because she cannot sit in a chair for eight hours without pain and could not use her hands for that long a period of time. (Tr. 52-53). She said she lays down about every two hours. (Tr. 53). She described her limited daily activities. (Tr. 53).

Plaintiff testified that she has been considering back surgery, in spite of her fear, because she is getting to the point where she cannot walk. (Tr. 54).

The Commissioner's decision

On October 17, 2000, an evidentiary hearing was held before an Administrative Law Judge (ALJ). The ALJ issued his written opinion on December 19, 2000. In that opinion, he made the following findings of fact and conclusions of law that are at issue in this action:

1. Plaintiff has not engaged in substantial gainful employment since February 2, 1999.

2. "The medical evidence establishes that [plaintiff] has severe degenerative changes and mild diffuse degenerative disk bulging at L2-L3, at L3-L4, at L4-L5, and at L5-S1 without disk herniation and status-post instep plantar fasciotomy of the right. Plaintiff has a "non-severe affective mood disorder."

3. None of plaintiff's impairments, or combination of them, are found in, or are medically equal to one found in, the Commissioner's list of disabling impairments.

4. Plaintiff has no limitation of daily living or social activities. She is slightly limited in "concentration, persistence, or pace." Plaintiff suffers from "episodes of decompensation within one year, each lasting for at least two weeks."

5. The plaintiff is not a credible witness about her limitations, because neither the objective medical evidence nor plaintiff's treatment history supports her allegations.

6. Plaintiff has the maximum residual functional capacity to lift and carry no more than 10 pounds, to sit for up to six hours in an eight-hour workday, to stand and/or walk for up to two hours each in an eight-hour workday, and to perform the full range of sedentary work.

7. Plaintiff's past relevant work as a police officer, as she performed it, did not require the performance of work-related activities that are precluded by the limitations set forth in paragraph 6, above. Plaintiff can perform her past relevant work as a police officer as she performed it.

8. Plaintiff is not disabled under the Social Security Act.

(Tr. 18-20).

On April 19, 2001, the Appeals Council of the Social Security Administration denied plaintiff's request for review. (Tr. 5-6). Thus, the decision of the ALJ stands as the final decision of the Commissioner.

DISCUSSION

Rules of Decision

In this judicial review of the Commissioner's final decision, the court

> must determine whether the Commissioner's findings are supported by substantial evidence on the record as a whole. See Prosch v. Apfel, 201 F.3d 1010, 1012 (8th Cir. 2000). "Substantial evidence is less than a preponderance, but is enough that a reasonable mind would find it adequate to support the Commissioner's conclusions." Id. The court may not reverse merely because evidence would have supported a contrary outcome. See id.

Dunahoo v. Apfel, 241 F.3d 1033, 1037 (8th Cir. 2001).

In determining whether the Commissioner's findings are supported by substantial evidence, the court must consider "evidence that detracts from the Commissioner's decision as well as evidence that supports it." Warburton v. Apfel, 188 F.3d 1047, 1050 (8th Cir. 1999).

Under the Act, plaintiff must prove that she is unable to perform any substantial gainful activity due to any medically determinable physical or mental impairment which would either result in death or which has lasted or could be expected to last a continuous period of at least 12 months. See 42 U.S.C. § 1382c(a)(3)(A).

Under the Commissioner's regulations, plaintiff must first prove that one or more impairments prevent her from performing her past relevant work. Pickner v. Sullivan, 985 F.2d 401, 403 (8th Cir. 1993). If she satisfies this burden, the burden shifts to the Commissioner to prove that she is able to perform some other substantial gainful activity in the national economy, given her residual functional capacity, her age, her education, and her work experience. Id. As set forth above, the ALJ found that plaintiff did not sustain this burden.

The parties' arguments

In this action, plaintiff argues that the ALJ's decision is not supported by substantial evidence, because (1) the ALJ failed to give sufficient weight to the findings and opinions of her treating physician, Dr. Bramhall; (2) the ALJ erred in finding that her mental impairment is not severe; and (3) the ALJ improperly found that plaintiff could return to her past relevant work. The defendant Commissioner argues that the decision of the ALJ is supported by substantial evidence and must be sustained.

Plaintiff's past relevant work

Under the regulations, the Commissioner must engage in a five-step analysis of the record. This analysis covers consideration of any current work activity, the severity of the plaintiff's impairments, her residual functional capacity, given her age, education, and work experience. 20 C.F.R. § 404.1520(a); Braswell v. Heckler, 733 F.2d 531, 533 (8th Cir. 1984). In this case, the ALJ reached Step 4 and determined that plaintiff could perform her past work as a police officer.

If a claimant can perform her past relevant work, she is not disabled. McCoy v. Schweiker, 683 F.2d 1138, 1142 (8th Cir. 1982) (en banc); 20 C.F.R. § 1520(e).

> An ALJ's decision that a claimant can return to his past work must be based on more than conclusory statements. The ALJ must specifically set forth the claimant's limitations, both physical and mental, and determine how those limitations affect the claimant's residual functional capacity.

Pfitzner v. Apfel, 169 F.3d 566, 568 (8th Cir. 1999) (quoting Groeper v. Sullivan, 932 F.2d 1234, 1238-39 (8th Cir. 1991)).

Residual functional capacity "is not the ability merely to lift weights occasionally in a doctor's office; it is the ability to perform the requisite physical acts day in and day out, in the

sometimes competitive and stressful conditions in which real people work in the real world." Ingram v. Chater, 107 F.3d 598, 604 (8th Cir. 1997).

> Defining a claimant's residual functional capacity is not the only task required at step four. "The ALJ must also make explicit findings regarding the actual physical and mental demands of the claimant's past work."

Pfitzner, 169 F3d. at 569 (quoting Groeper, 932 F.2d at 1239).

As set forth above, the ALJ found that plaintiff could lift and carry no more than 10 pounds, could sit for up to six hours in an eight hour workday, and could stand and walk for up to two hours each in an eight hour workday. Thus, she could perform the full range of sedentary work. (Tr. 18, 20).

Regarding the requirements of plaintiff's past work as a police officer, the ALJ stated,

> [plaintiff] indicated that her past work as a police officer required that she stand and walk for only one hour each and lift less than ten pounds (Exhibit 4E). Based on [plaintiff's] description of her past relevant work, [her] past relevant work as a police officer did not require the performance of work-related activities precluded by her residual functional capacity. Therefore, [she] can perform her past relevant work as a police officer as she performed it.

(Tr. 19). These findings by the ALJ regarding the requirements of plaintiff's prior work as a police officer are not supported by substantial evidence.

Administrative record Exhibit 4E, to which the ALJ refers, lists three positions: prison corrections officer I (from January 1997 to May 1998), police department officer (also from January 1997 to May 1998), and deputy sheriff in a private resort (from July 1996 to March 1998). (Tr. 196). The ALJ described her work

collectively ("all of this kind of being security police work"). (Tr. 37). The prison corrections officer position was described by plaintiff as having involved writing reports of the actions of inmates, carrying inmates' property 50 feet to a search room, and lifting 50 pounds as the heaviest weight lifted and lifting less than 10 pounds frequently. (Tr. 197). The police officer and deputy sheriff positions were described by plaintiff as using a radar gun, driving around to answer calls, standing for one hour, walking for one hour, sitting for six hours, carrying a clip board and ticket book, and lifting less than ten pounds. (Tr. 198, 199). Plaintiff's oral testimony under oath before the ALJ was that she could not perform the duties required by these positions, because of her back pain. (Tr. 37-38). The security guard work involved only standing for eight hours. (Tr. 39). Clearly, if the ALJ credited plaintiff's testimony about the requirements of her prior security guard work, she would not be able to do it, because it required her to stand throughout the work shift. Further, plaintiff stated in her written disability statement that firing a gun also caused her problems.

The ALJ's findings about plaintiff's residual functional capacity to perform the full range of sedentary work are not supported by substantial evidence. He found that plaintiff did not require surgery for her back. (Tr. 18). However, as early as February 1995, Dr. Luschtefeld recommended surgery. (Tr. 250). The presence of a bulging disk is repeatedly noted by doctors in December 1995, March 1999, and November 1999.

Further, in January 2000 Dr. Bramhall stated that plaintiff was unable to work on account of her pain. (Tr. 294). The ALJ discredited this finding, because it was

> inconsistent with the other substantial evidence in the case record (SSR 96-2p). As explained above, the objective medical evidence failed to reveal signs of an

> abnormality that would limit the [plaintiff] as severely as Dr. Bramhall opined, the [plaintiff] did not undergo treatment indicative of Dr. Bramhall's opinion, and the [plaintiff's] daily activities contradict the limitations as assessed by Dr. Bramhall.

(Tr. 18-19).

Under Eighth Circuit precedent, the opinion of a treating physician

> should not ordinarily be disregarded and is entitled to substantial weight. Ghant v. Bowen, 930 F.2d 633, 639 (8th Cir. 1991). **In fact, it should be granted controlling weight if it is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in the record.** See Kelly v. Callahan, 133 F.3d 583, 589 (8th Cir. 1998). By contrast, "[t]he opinion of a consulting physician who examines a claimant once or not at all does not generally constitute substantial evidence." Id.

Cunningham v. Apfel, 222 F.3d 496, 502 (8th Cir. 2000) (emphasis added). A treating physician's opinion is suspect when based upon an incomplete record. Woolf v. Shalala, 3 F.3d 1210, 1214 (8th Cir. 1993).

As early as February 1995, in a consultative medical opinion, Dr. Luschtefeld questioned plaintiff's ability to work. (Tr. 250). The record shows that Dr. Bramhall has seen plaintiff for years and has amassed much data about her condition. His opinion should not have been discredited without specific vocational evidence for doing so.

Plaintiff's mental impairment

Plaintiff takes issue with the ALJ's finding that her mental condition is not severe. For applications for supplemental security income benefits, an impairment is not severe, "if it does not significantly limit [the claimant's] physical or mental ability to do basic work activities." 20 C.F.R. § 416.921(a).

In support of this finding, the ALJ referred to the examination report of psychologist Kenneth Mayfield, described above. He also adverted to the fact that plaintiff did not seek treatment from a mental health professional. He also applied the special technique for evaluating mental impairments and found that her condition did not satisfy the listing requirements. (Tr. 16).

While the undersigned might have given greater weight to the repeated references to depression and the prescription of Prozac, it is not for the court to make findings upon contrary evidence. Dunahoo v. Apfel, 241 F.3d at 1037. The ALJ's finding that plaintiff's mental condition is not severe is supported by substantial evidence.

RECOMMENDATION

For the reasons set forth above, the undersigned recommends that the court, under Sentence 4 of 42 U.S.C. § 405()g), reverse the decision of the defendant denying benefits and remand the action for further proceedings. In these proceedings, the ALJ should conduct a supplemental hearing and consider, at Step 5 of the prescribed analysis, whether there is other substantial gainful activity that plaintiff can perform.

The parties may have 11 calendar days, until September 16, 2002, to file written objections to this Report and Recommendation. The failure to file timely, written objections may waive the right to appeal issues of fact.

DAVID D. NOCE

UNITED STATES MAGISTRATE JUDGE

Signed this _____ day of September, 2002.